



## TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF FACTS	2
	A. The Real Negotiation and the Execution of the LOI	2
	B. Weaver Relies Upon Immaterial and Disputed Facts in the MSJ	4
	1. Weaver Made Two Misrepresentations to Tampa	4
	2. Tampa Suffered Losses as a Result of Weaver's	6
	Misrepresentations	
	3. Tampa Was a Viable Investment Vehicle Which Lost	7
	all Value	
III.	SUMMARY JUDGMENT STANDARDS	7
IV.	ARGUMENT	9
	A. Plaintiff's MSJ Fails to Address the Elements of Each Claim	9
	1. Intentional Misrepresentation	9
	2. Negligent Misrepresentation	10
	3. Concealment	10
	4. False Promise	11
	B. Agency	12
V.	CONCLUSION	13

# TABLE OF AUTHORITIES

## Federal Cases

<i>Anderson v. Liberty Lobby, Inc.</i>	7, 8
477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986)	
<i>Celotex Corp. v. Catrett</i>	8
477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986)	
<i>First National Bank of Arizona v. Cities Service Co.</i>	7, 8
391 U.S. 253 (1968)	
<i>Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.</i>	8
475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986)	
<i>Valandingham v. Bojorquez</i>	8
866 F.2d 1135 (9 <sup>th</sup> Cir. 1989)	
<i>Wilkerson v. McCarthy</i>	8
366 U.S. 53 (1949)	

## State Cases

<i>Anderson v. Beloitte &amp; Touche</i>	9
(1997) 56 Cal.App.4 <sup>th</sup> 1468	
<i>Boschma v. Home Loan Center, Inc.</i>	10
(2011) 198 Cal.App.4 <sup>th</sup> 230	
<i>Columbia Pictures Corp. v. DeToth</i>	12
(1948) 87 Cal.App.2d 620	
<i>Continental Airlines, Inc. v. McDonnell Douglas Corp.</i>	10
(1989) 216 Cal.App.3d 388	
<i>Engalla v. Permanente Medical Group, Inc.</i>	11
(1997) 15 Cal.4 <sup>th</sup> 951	
<i>Gagne v. Bertran</i>	9
(1954) 43 Cal.2d 481	

1	<i>Gonsalves v. Hodgson</i>	9
2	(1951) 38 Cal.2d 91	
3	<i>Hobart v. Hobart Estate Co.</i>	9
4	(1945) 26 Cal.2d 412	
5	<i>Limandri v. Judkins</i>	11
6	(1997) 52 Cal.App.4 <sup>th</sup> 326	
7	<i>Magpali v. Farmers Group, Inc.</i>	11
8	(1996) 48 Cal.App.4 <sup>th</sup> 471	
9	<i>O’Riordan v. Federal Kemper Life Assurance Co.</i>	12
10	(2005) 36 Cal.4 <sup>th</sup> 281	
11	<i>Tri-Delta Engineering, Inc. v. Insurance Co. of North America</i>	9
12	(1978) 80 Cal.App.3d 752	
13	<i>Wittenbrock v. Parker</i>	12
14	(1894) 102 Cal.93	
15	<b>Statutes</b>	
16	Federal Rule of Civil Procedure 56	7, 8
17	Delaware Limited Liability Company Act §18-402	4
18	<b>Other Authorities</b>	
19	California Civil Jury Instruction No. 1900	9
20	California Civil Jury Instruction No. 1901	10
21	California Civil Jury Instruction No. 1902	11
22	California Civil Jury Instruction No. 1903	10

1 **I. INTRODUCTION**

2 Defendant Tampa Investment Group, LLC (“Tampa”) opposes Plaintiff Evan Weaver’s  
3 (“Weaver”) Motion for Summary Judgment (“MSJ”) on Tampa’s Counterclaim. Weaver’s MSJ  
4 is based upon immaterial facts, facts which are in conflict with the evidence (even Weaver’s own  
5 testimony), misstatements of the law, misstatements of fact, and illogical contortions of Tampa’s  
6 causes of action.

7 Contrary to Weaver’s contentions, it was Weaver who deceived and induced Tampa, and  
8 Tampa that incurred \$2,453.5 in out of pocket costs, opportunity costs and lost profits on other  
9 pre-IPO transactions in Twitter stock, worth hundreds of thousands or millions of dollars as a  
10 result of Weaver’s misrepresentations. Tampa was a viable and valuable business entity which  
11 obtained Twitter’s consent to purchase its stock. All of this value was lost as a result of  
12 Weaver’s fraud.

13 Weaver made two misrepresentations of fact to Tampa through its agents.<sup>1</sup> Weaver  
14 clearly understood the distinction between “binding” and “non-binding” letters of intent  
15 (“LOIs”). Weaver and his attorney drafted two revisions to the LOI that would have made the  
16 LOI binding—in a surreptitious manner. (Tampa’s Answer and Counterclaim “CC” ¶¶ 17-20.)<sup>2</sup>  
17 These two versions of the LOI were never delivered to Tampa’s agents.

18 Instead, Weaver represented in an email that he would sign a “non-binding LOI” and  
19 executed an LOI that included all the original non-binding language originally proposed by  
20 Tampa. Weaver makes an incredible claim that one superfluous sentence—addressing only *one*  
21 reason why the LOI was non-binding—alters the non-binding nature of the LOI. (CC ¶21.) By  
22 adding this superfluous sentence, Weaver executed the LOI intending to preserve this claim that  
23 he understood the LOI to be “binding,” while concealing this ulterior motive.

---

24  
25  
26 1 For purposes of this Opposition, Paul McCabe, John Bivona and Robert Forlizzo are referred  
27 to as Tampa’s agents. Issues of fact over whether McCabe was Tampa’s agent remain for trial.  
28 2 Instead of simply deleting the non-binding paragraph, Weaver or his attorney added the section  
“Close” to the listed exceptions—those sections of the LOI which were binding (“Expenses” and  
“Confidentiality”).

1 Because of Weaver's misrepresentations, Tampa's agents focused their efforts on the  
 2 Weaver "deal" (since it was more than ten times larger than any prior LOI Tampa had executed  
 3 for Twitter stock) and reduced their efforts to buy Twitter stock from other shareholders.  
 4 Because of Weaver's misrepresentation, Tampa invested money and wasted attorneys' hours and  
 5 other costs to advance the Weaver "deal." Because Weaver never intended to dishonor and later  
 6 dishonored the non-binding LOI, Tampa's sole business purpose was entirely frustrated—  
 7 causing Tampa to lose millions in gains on other Twitter stock.

## 8 **II. STATEMENT OF FACTS**

### 9 **A. The Real Negotiation and the Execution of the LOI.**

10 The LOI is not ambiguous. Weaver's extensive correspondence confirms that he fully  
 11 understood the LOI to be "non-binding." The fact that Twitter might exercise its right of first  
 12 refusal ("ROFR") was but one reason the LOI was non-binding. Weaver has contrived a story  
 13 that conflates two very different possibilities which might have arisen after he presented his  
 14 notice of a proposed sale to Twitter.

15 Weaver wrote extensive emails about the distinction between a "block" and a "ROFR,"  
 16 reflecting his clear understanding of these two discreet possibilities. Now, Weaver has blended  
 17 (a) a "blocked trade" and (b) Twitter's exercise of its "ROFR;" creating a hybrid concept: (c)  
 18 "frustrating the sale." This one issue shows that Weaver has contrived this claim and that the  
 19 original LOI was clearly non-binding.

20 Weaver was never told that Tampa had the funds to buy his stock, and he never asked if  
 21 Tampa had assets until September 22, 2011. ((Tampa's Opposition to Weaver's Motion to  
 22 Amend Complaint ("OMAC"), King Dec., Ex. 3) To the contrary, several emails document  
 23 Weaver's clear understanding that Tampa was continuing to solicit potential "investors" after the  
 24 non-binding LOI was signed. (OMAC, King Dec., Ex. 39.)

25 In discovery, Weaver has produced emails showing he understood and was willing to  
 26 execute a non-binding LOI for good reason: the dramatically higher price in Tampa's proposal.

- 27 1. On August 3, 2011, Weaver wrote to his colleague Eric Maland that McCabe was  
 28 offering a "too-good-to-be-true price." (OMAC, King Dec., Ex. 20.)

2. On August 10, 2011, after reviewing the LOI Weaver wrote to McCabe that his attorney "was surprised to see that the LOI isn't binding." (OMAC, King Dec., Ex. 26.)
3. On August 11, 2011, Weaver replied to McCabe that his attorney was "on the fence about whether it should be binding or not..." (OMAC, King Dec., Ex. 28.)
4. On August 12, 2011 Weaver wrote to McCabe, "We'll do the non-binding agreement although it still would be cool to see previous LOIs." (OMAC, King Dec., Ex. 29.)

The record shows Weaver hoped and expected that Twitter would exercise its ROFR, creating the best of all worlds where:

- this "too-good-to-be-true price" (OMAC, King Dec., Ex. 20),
- offered in a "non-binding" LOI (OMAC, King Dec., Ex. 26, 27, 28, 29),
- by a "half-assed buyer" (OMAC, King Dec., Ex. 24),
- through a "shady" broker (OMAC, King Dec., Ex. 20),
- would be ROFR'd by Twitter and assigned to the "well-capitalized ROFR buyers." (OMAC, King Dec., Ex. 24),
- On August 22, 2011, Weaver wrote to McCabe, "[Twitter] will ROFR after 30, 99% chance." (OMAC, King Dec., Ex. 25.)

Weaver knew *exactly* what he was doing: assuming the risk of executing a non-binding deal with Tampa, hoping Twitter would exercise or assign its ROFR and thereby secure a binding agreement with a "well-capitalized" buyer. However, Weaver never intended to honor the non-binding LOI if Twitter did not exercise or assign its ROFR; rather, he intended to claim the LOI was *binding*. This was an incredible scheme of greed and deception by a software engineer earning tens of millions on his stock.

#### **B. Weaver Relies Upon Immaterial and Disputed Facts in the MSJ**

##### **1. Weaver Made Two Misrepresentations to Tampa.**

Weaver made his first misrepresentations of fact when he claimed in an August 12, 2011 email message that he would execute a non-binding LOI. (SSUMF ¶ 9.) Weaver made his

1 second misrepresentation when he executed the non-binding LOI with the secret intention of  
 2 later claiming it was binding if Twitter did not exercise its ROFR. Weaver made these  
 3 representations to people he understood to be Tampa's agents – Bivona and McCabe.

4 Weaver testified extensively that he believed both McCabe and Bivona were agents and  
 5 representatives of Tampa, and both McCabe and Bivona had actual knowledge of the terms of  
 6 the deal before the term sheet arrived.<sup>3</sup> (SSUMF ¶ 3 and 4.) Tampa's Managing Member,  
 7 Robert Forlizzo, is also an agent of Tampa, the limited liability company. (Del. Limited  
 8 Liability Company Act §18-402.) As a matter of law set forth below, Tampa, the entity, knew of  
 9 Weaver's misrepresentations, imputed from the knowledge of its agents. McCabe and Bivona  
 10 each spoke directly to Weaver about the "deal." (SSUMF ¶ 3.) Indeed, Weaver negotiated with  
 11 both McCabe and Bivona, and Weaver testified that both were "Tampa's agents." (SSUMF ¶ 4.)

12 Furthermore, McCabe and Bivona spoke with each other about the "deal." (Id.) And  
 13 Bivona communicated with Tampa's Managing Member, Forlizzo, about the LOI, having a few  
 14 conversations about the "deal." (SSUMF ¶ 5.) Several of Bivona's conversations with Forlizzo  
 15 were attorney-client privileged communications, but Bivona advised Forlizzo to expect delivery  
 16 of the LOI, and that the LOI was "in good enough shape to sign." (SSUMF ¶ 7.) The evidence  
 17 shows that Tampa, through its agents, was aware of the "deal" with Weaver before the LOI was  
 18 delivered and was aware that Weaver agreed the LOI was non-binding. (SSUMF ¶ 5.)

19 Whether Tampa's Managing Member, Forlizzo, communicated directly with Weaver  
 20 about his understanding of the LOI is immaterial. (SSUMF ¶ 8.) Bivona was given full authority  
 21 by Forlizzo to act on behalf of Tampa, demonstrating that Tampa negotiated the terms of the  
 22 LOI. (Id.)<sup>4</sup>

---

23  
 24  
 25 3 Weaver relies upon testimony from Tampa's Managing Member, Forlizzo, that McCabe was  
 26 not Tampa's broker. However, Weaver's testimony shows that he believes McCabe was Tampa's  
 27 agent and broker, creating an issue of fact for trial. (SSUMF ¶ 4 and 10.)

28 4 Weaver's writings are crystal clear, while his testimony is nebulous at best. (OMAC, King  
 Dec., Ex.26, 28, 29, Ex. 21, pg. 162-63, 165,).



Weaver misstates the counterclaim by ignoring Tampa's claim that Weaver made a misrepresentation when he signed and delivered the final LOI. (CC p. 21:1, p. 21:12-13) Weaver's execution and delivery of the LOI is a second written misrepresentation of Weaver's intent to execute a non-binding LOI (the first being the email, referenced above).

Had Weaver written an email: "I demand a binding LOI," and executed an LOI, he would not have made a misrepresentation by signing an LOI—so long as he *truly believed* the text was binding. Since he mislead Tampa in his August 12, 2011 email message, he mislead Tampa again when he signed the final non-binding LOI. (SSUMF ¶ 9.)

Tampa's understanding of Weaver's agreement to enter a non-binding LOI was based upon misrepresentations Weaver made to Tampa's agents and the express non-binding language in the LOI. Weaver testified that the non-binding text in the LOI was the language "Paul [McCabe] provided" to him, which his own attorney labeled "non-binding," and Weaver himself described as "non-binding" when he agreed to execute the final LOI. (NOL: Ex. B, Weaver Dep. Vol. II at 143:22-144:7; 144:16-24; 156:1-8; 157:14-23; Ex. 28, 33 ) (SSUMF ¶ 13.)

Even if Tampa's Managing Member, Forlizzo, did not authorize "Bivona to offer a certain price," this is not material to Tampa's counterclaim. Tampa's Managing Member, Forlizzo, gave Bivona full authority to act on Tampa's behalf. (SSUMF ¶ 6.) Bivona also served as Tampa's placement agent for the Twitter transactions and fundraising. (Id.)

## 2. Tampa Suffered Losses as a Result of Weaver's Misrepresentations.

Weaver's MSJ misstates and illogically contorts the Counterclaim. (MSJ, p. 10:27-11:4.) Tampa does not seek damages simply from disparagement or its reduced efforts to solicit Twitter shareholders; harm is also alleged to have arisen because Weaver "dishonored the Non-Binding LOI." (CC p. 21:1, p. 21:12-13.)

In addition to the harm Tampa has plead, damages will be established by Tampa showing the expenses incurred in reliance on Weaver's misrepresentation. (Declaration of Robert A. Forlizzo in Support of Oppo. to MSJ, ("Forlizzo Dec.") ¶4.) Barring Weaver's misrepresentation and dishonor of the non-binding LOI, and the resulting futility of future efforts to solicit sellers and investors, Tampa would have remained a viable business entity with the potential to reap

extraordinary gains on Twitter stock transactions. (Forlizzo Dec. ¶6.) The fact that an investment fund is foreclosed from investing in stocks is a “logical” loss of business opportunities, as much as any other business with foreclosed operations suffers a “loss.” Weaver’s MSJ contorts logic to draw a caricature of Tampa’s claims. (MSJ, p. 11:9-13.) Weaver’s dishonor of the LOI and related forms of disparagement are the facts that prove that his representations to enter a non-binding LOI were untrue. Tampa was induced by Weaver’s misrepresentations, and following Weaver’s dishonor of the representations, Tampa became a worthless entity.

Weaver did not notify Twitter employees that his “deal” fell through because he signed a “nonbinding LOI,” as he represented to Tampa; rather, Weaver told Twitter employees (including its in-house counsel) and investors that Tampa breached the LOI. (CC ¶¶ 34, 52, 59.) Tampa’s decision to execute the LOI was induced as a direct result of Weaver’s representation that he would sign a “non-binding” LOI, and his execution of such LOI.

Due to Weaver’s misrepresentations around the LOI and his execution of the LOI, Tampa agents solicited investors for specifically for this “deal” (SSUMF ¶ 21), which was nearly ten times the dollar amount of Tampa’s previous LOIs for Twitter stock. Tampa’s agents also reduced efforts to secure other LOIs while Tampa had a \$28,111,200 LOI pending with Weaver. Weaver’s First Amended Complaint (“FAC”) states the reasons why Tampa would reduce its efforts to solicit more sellers of Twitter stock:

Discovery has further revealed that, by letter agreements dated June 14, 2011, that look like the one given to Weaver, Tampa had entered into two earlier transactions involving Twitter stock. Each was for a per-share price at \$20, but at much lower volumes than Weaver’s deal. The one with Brendan Thomas was for 100,000 shares, and a cumulative price of \$2,000,000. The one with Santosh Jayaran was for 90,000 shares, and a cumulative price of \$1,800,000.

(FAC ¶ 59, fn. 1.)

//

//

//

3. Tampa Was a Viable Investment Vehicle Which Lost all Value.

In 2011, Tampa's placement agents had approximately 1,400 qualified investors who had purchased interests in Pre-IPO stock, and both agents had solicited investors for Weaver's shares who were interested in buying Twitter stock. (SSUMF ¶ 21.) The fact that Tampa had not been fully funded at the time of executing the LOI has no bearing on its expenses and lost profits.

The number of Tampa's initial members and the capitalization of the LLC are both immaterial, in light of the fact that Tampa merely executed a non-binding LOI, maintaining ongoing fundraising efforts by its placement agents. (SSUMF ¶ 16) Similarly, the fact that Tampa had only executed two LOIs for Twitter stock prior to the Weaver deal is immaterial to Weaver's MSJ. (SSUMF ¶ 18, 19.)

After Weaver dishonored the LOI and took actions in furtherance thereof, Tampa's sole business purpose was completely frustrated and further solicitations of sellers or investors became futile. (NOL: Ex. C, Forlizzo Dep. at 32:1-19; 33:13-19.)

The testimony of one agent, Forlizzo, about his knowledge of Tampa's business activity after Weaver dishonored the LOI is immaterial. Furthermore, Forlizzo twice testified that McCabe and Bivona would know whether other agents of Tampa made efforts to solicit more sellers of Twitter stock and additional investors to fund such prospective purchases. (SSUMF ¶ 20, 21, 22, 23, 24.)

### III. SUMMARY JUDGMENT STANDARDS

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the non-moving party's favor. (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).) If the evidence is such that a reasonable jury could return a verdict for the nonmoving party, summary judgment is not proper. (*First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968). "All that is required is that sufficient evidence supporting the claimed factual

1 dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth  
 2 at trial." (*Id.* at 288-89.) If reasonable minds could differ as to the import of the evidence,  
 3 summary judgment is not proper. (*Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949). The judge's  
 4 function at the summary judgment stage is not to weigh the evidence and determine the truth of  
 5 the matter but only to determine whether there is a genuine issue for trial. (*Anderson, supra*, 477  
 6 U.S. at 249.)

7 The party moving for summary judgment bears the initial burden of establishing the  
 8 absence of a genuine issue of material fact and can satisfy this burden by presenting evidence  
 9 that negates an essential element of the non-moving party's case. (*Celotex Corp. v. Catrett*, 477  
 10 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).) Alternatively, the movant can  
 11 demonstrate that the non-moving party cannot provide evidence to support an essential element  
 12 upon which it will bear the burden of proof at trial. (*Id.*) Once the moving party meets its initial  
 13 burden, the non-moving party must "go beyond the pleadings and by her own affidavits, or by  
 14 'the depositions, answers to interrogatories, and admissions on file,' [and] designate 'specific  
 15 facts showing that there is a genuine issue for trial.'" (*Id.*, 324 (quoting Fed. R. Civ. P. 56(e)).)  
 16 The non-movant "may not rest upon the mere allegations or denials of the adverse party's  
 17 pleading." (Fed. R. Civ. P. 56(e); *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir.  
 18 1989).) However, any inferences drawn from the underlying facts must be viewed in the light  
 19 most favorable to the party opposing the motion. (*Matsushita Elec. Indus. Co., Ltd. v. Zenith*  
 20 *Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).)

21 Weaver failed to meet his initial burden because he mischaracterizes the record and his  
 22 motion should be denied. In any event, as set forth in this opposition, genuine issues of material  
 23 fact exist; therefore, Weaver's motion seeking summary judgment should be denied in its  
 24 entirety.

25 //

26 //

27 //

28 //

1 **IV. ARGUMENT**

2 **A. Plaintiff's MSJ Fails to Address the Elements of Each Claim.**

3 **1. Intentional Misrepresentation.**

4 To recover for fraud based on an intentional misrepresentation, Tampa must prove: (1)  
5 that Weaver represented to Tampa that an important fact was true; (2) that Weaver's  
6 representation was false; (3) that Weaver knew that the representation was false when he made it,  
7 or that he made the representation recklessly and without regard for its truth; (4) that Weaver  
8 intended that Tampa rely on the representation; (5) that Tampa reasonably relied on Weaver's  
9 representation; (6) that Tampa was harmed; and (7) that Tampa's reliance on Weaver's  
10 representation was a substantial factor in causing its harm. (California Civil Jury Instruction No.  
11 1900; *Gonsalves v. Hodgson* (1951) 38 Cal.2d 91, 100-101; *Hobart v. Hobart Estate Co.* (1945)  
12 26 Cal.2d 412; *Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1474.)

13 "The general rule is that unless a party's reliance is irrational or "preposterous," he or she  
14 is entitled to rely on the representations of the other party and on the representations of the other  
15 party's agent without making an independent investigation to discover the falsity of the  
16 representation. (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 488-489.) Punitive damages may be  
17 recovered for intentional fraud." (*Tri-Delta Engineering, Inc. Insurance Co. of North America*  
18 (1978) 80 Cal.App.3d 752.)

19 In this case, Weaver represented to Tampa his agreement to enter a non-binding LOI (via  
20 email, to someone Weaver understood to be Tampa's broker, and through his execution of the  
21 LOI.) (SSUMF ¶13.) In fact, Weaver did not intend to honor these representations if Twitter did  
22 not exercise or assign its ROFR, and he knew this when he expressed his intent to Tampa.  
23 Weaver intended for Tampa to rely upon his misrepresentation, which was reasonable based  
24 upon his deliberation and decision, and to execute the LOI with a "too good to be true price."  
25 Tampa incurred costs as a result, lost profits on other Twitter stock transactions, and ultimately  
26 became a defunct entity foreclosed from its sole business purpose.

27 Further, if Tampa had not relied upon Weaver's representations it would have avoided  
28 the out-of-pocket costs and opportunity costs it lost on Weaver's LOI and "lived to fight another

day” in the pre-IPO market for Twitter stock. By attaining Twitter’s approval to purchase its stock, Twitter was a valuable enterprise. Due to Weaver’s deception, Tampa became worthless.

## 2. Negligent Misrepresentation.

The prevail on its claim for negligent misrepresentation, Tampa must prove: (1) that Weaver represented to Tampa that an important fact was true; (2) that Weaver’s representation was not true; (3) that Weaver had no reasonable grounds for believing the representation was true when he made it; (4) that Weaver intended that Tampa rely on this representation; (5) that Tampa reasonably relied on Weaver’s representation; (6) that Tampa was harmed; and (7) that Tampa’s reliance on Weaver’s representation was a substantial factor in causing its harm.

(CACI 1903; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 402.)

Here, Weaver represented to Tampa his agreement to enter a non-binding LOI without intent to honor these representations if Twitter did not exercise or assign its ROFR, knowing his true intent, and seeking to induce Tampa to execute the LOI for a “too good to be true price.” Tampa’s reliance was reasonable and it suffered a range of damages set forth above as a direct result of Weaver’s concealment.

## 3. Concealment.

To prevail on its claim for fraudulent concealment, Tampa must prove: (1) that Weaver intentionally failed to disclose an important fact that was known only to him and that Tampa could not have discovered; (2) that Tampa did not know of the concealed fact; (3) that Weaver intended to deceive Tampa by concealing the fact; (4) that Tampa reasonably relied on Weaver’s deception; (5) that Tampa was harmed; and (6) that Weaver’s concealment was a substantial factor in causing Tampa’s harm. (CACI 1901; *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248.)<sup>5</sup>

---

<sup>5</sup> The circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (2) when the defendant actively conceals a material fact from the plaintiff; and (3) when the defendant makes partial representations but also suppresses some material facts... Each of the [three non-fiduciary] circumstances in which nondisclosure may be actionable presupposes the



1 Here, Weaver concealed from Tampa his intent to dishonor the non-binding terms of the  
 2 LOI, and Tampa had no way of knowing the deception which Weaver intended. Tampa suffered  
 3 harm, as set forth above, which was the direct result of Weaver's concealment.

#### 4 4. False Promise.

5 "Promissory fraud" is a subspecies of fraud and deceit. A promise to do something  
 6 necessarily implies the intention to perform; hence, where a promise is made without such  
 7 intention, there is an implied misrepresentation of fact that may be actionable fraud. [¶] An  
 8 action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter  
 9 into a contract.' " *Engalla v. Permanente Medical Group, Inc.* 15 Cal.4th 951, 973—974 (1997,  
 10 internal citations omitted.)

11 "A promise of future conduct is actionable as fraud only if made without a present intent  
 12 to perform. 'A declaration of intention, although in the nature of a promise, made in good faith,  
 13 without intention to deceive, and in the honest expectation that it will be fulfilled, even though it  
 14 is not carried out, does not constitute a fraud.' Moreover, ' "something more than  
 15 nonperformance is required to prove the defendant's intent not to perform his promise." . . . [I]f  
 16 plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an  
 17 oral promise, he will never reach a jury.' " (*Magpali v. Farmers Group, Inc.* 48 Cal.App.4th 471,  
 18 481 (1996, internal citations omitted; *see also* CACI 1902.)

19 Here, the "performance" Weaver promised, but never intended to deliver, was to  
 20 acknowledge Tampa's right to terminate the proposed sale, for any reason or none at all, without  
 21 consequences, just as Tampa was obligated to honor Weaver's right to do the same. Weaver and  
 22 his transactional attorney's (i) actions to draft material—but surreptitious—modifications to the

---

23  
 24 existence of some other relationship between the plaintiff and defendant in which a duty to  
 25 disclose can arise . . . [S]uch a relationship can only come into being as a result of some sort of  
 26 transaction between the parties... Thus, a duty to disclose may arise from the relationship  
 27 between seller and buyer...or parties entering into any kind of contractual agreement.' All of  
 28 these relationships are created by transactions between parties from which a duty to disclose  
 facts material to the transaction arises under certain circumstances." (*Limandri v. Judkins* (1997)  
 52 Cal.App.4th 326, 336—337 (internal citations, italics, and footnote omitted).)

1 non-binding nature of the LOI, which were never delivered to Tampa or its agents, followed by  
 2 (ii) the final addition of a superfluous sentence—to feign confusion, show that Weaver had no  
 3 intent to perform as he represented.

#### 4 **B. Agency**

5 Under the doctrine of imputed knowledge a principal is chargeable with the knowledge or  
 6 notice received by his or her agent while the agent is acting within the scope of his or her  
 7 authority. *Columbia Pictures Corp. v. DeToth*, 87 Cal. App. 2d 620, 630 (1948). The law  
 8 imputes the knowledge to the principal, regardless of whether the agent actually communicates  
 9 the knowledge to the principal. (Id).

10 “As against a principal, both principal and agent are deemed to have notice of whatever  
 11 either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to  
 12 communicate to the other.” *Columbia Pictures Corp.*, 87 Cal.App.2d at 630; *Cal. Civ. Code*, §  
 13 2332. The agent acting within the scope of his authority, is, as to the matters existing therein  
 14 during the course of the agency, the principal himself. *Wittenbrock v. Parker*, 102 Cal. 93, 101,  
 15 102 (1894). “The fact that the knowledge acquired by the agent was not actually communicated  
 16 to the principal . . . does not prevent operation of the rule.” *Columbia Pictures Corp.*, 87  
 17 Cal.App.2d, at 630; *O’Riordan v. Federal Kemper Life Assurance Co.*, 36 Cal.4th 281, 288  
 18 (2005). “This rule of law is not a rebuttable presumption. It is not a presumption at all. It is a rule  
 19 which charges the principal with the knowledge possessed by his agent.” *Columbia Pictures*  
 20 *Corp.*, 87 Cal.App.2d at 631.

21 Here, all of Tampa’s agents represented a limited liability company. Tampa, the entity, is  
 22 imputed with the knowledge of all its agents whether or not all of the agents shared the same  
 23 knowledge.

24 //

25 //

26 //

27 //

28 //



1 **V. CONCLUSION**

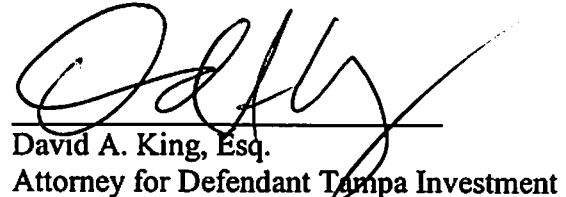
2 Weaver's Motion for Summary Judgment to Tampa's Counter-claim should be denied in  
3 its entirety.

4  
5 Dated: March 2, 2015

Respectfully submitted,

THE KING LAW GROUP

6  
7 By:

8   
9 David A. King, Esq.  
Attorney for Defendant Tampa Investment  
Group, LLC